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No. 08-38

Supreme Court, U.S.
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In The
Supreme Court of the United States

JAREK MOLSKI, THOMAS E. FRANKOVICH, THOMAS E. FRANKOVICH, a Professional Law Corporation,

Petitioners,

vs.

EVERGREEN DYNASTY CORPORATION, D/B/A MANDARIN TOUCH RESTAURANT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

EVERGREEN DYNASTY CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO QUESTION PRESENTED

Jarek Molski was declared a vexatious litigant and precluded from filing further lawsuits under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., without prior approval from the presiding justice of the United States District Court for the Central District of California only. Mr. Molski's unfettered right to file ADA action in the Southern and Northern Districts of California are unaffected by the District Court's Order. Mr. Molski was declared a vexatious litigant because the District Court found that "Plaintiff's extensive collection of lawsuits, the Court believes that most, if not all, were filed as part of a scheme of systematic extortion, designed to harass and intimidate business owners into agreeing to cash settlements." [APP. 79] "The Court bases this determination on several considerations. One is the sheer volume of lawsuits filed by this Plaintiff. . . . Here, Molski's filings are plainly numerous, and, as discussed throughout this order, abusive as well. . . . Most important, however, is the Court's conclusion that the allegations contained in Plaintiff's complaints are contrived and not credible. Although it is not obvious when looking at an individual complaint, examining Plaintiff's complaints in the aggregate reveals a clear intent to harass businesses." [APP. 80]

Mr. Molski was not declared a vexatious litigant until ***after*** a full hearing on the merits which was held by the District Court on November 15, 2004.

RESPONSE TO QUESTION PRESENTED – Continued

The District Court afforded Thomas E. Frankovich and Thomas E. Frankovich, a Professional Law Corporation ("**Frankovich Group**") with notice and an opportunity to be heard before imposing its pre-filing order as a sanction. On December 10, 2004, the District Court issued an order to show cause why the Court should not impose a pre-filing order on the Frankovich Group for its role in facilitating Mr. Molski's litigation. [See *Molski v. Mandarin Touch Restaurant*, 347 F.Supp.2d 860, 867 (C.D. Cal. 2004)] the order to show cause is reprinted at APP. 1-3. A hearing was held on February 7, 2005. At that hearing, the District Court announced its tentative ruling, including the findings of fact and conclusions of law that formed the basis of the pre-filing order against the Frankovich Group. Despite requesting and receiving a continuance, purportedly to allow the Frankovich Group time to prepare for that hearing, the Frankovich Group did not challenge any of the District Court's tentative findings or conclusions, and did not present any oral argument. [See *Molski v. Mandarin Touch Restaurant*, 359 F.Supp.2d 924, fn. 1 (C.D. Cal. 2005)]

There are simply no grounds upon which this Honorable Court can grant Mr. Molski or the Frankovich Group the relief requested.

PARTIES TO THE PROCEEDING

Petitioner Jarek Molski was the Plaintiff and the Frankovich Group was Mr. Molski's attorney in the action below, and they were the Appellants in the United States Court of Appeals for the Ninth Circuit.

Respondent Evergreen Dynasty Corporation was a Defendant in the District Court proceeding, and the Appellee in the United States Court of Appeals for the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Evergreen Dynasty Corporation has no parent corporation and no publicly listed company holds more than 10% of its stock.

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The United States District Court's Order Declaring Jarek Molski (and NOT the Frankovich Group) a Vexatious Litigant and precluding him from filing further ADA Complaints without the permission of the presiding judgment of the District Court for the Central District of California is reported at 347 F.Supp.2d 860 (C.D. Cal. 2004), and is reprinted in Petitioners' Petition at APP. 71.

The United States District Court's Order to Show Cause commanding the Frankovich Group to show cause why the District Court should not require them to seek leave of court before filing a complaint alleging violations of the ADA, and to show cause why the District Court should not pursue disciplinary action against them under Local Rule 83-3 is reprinted at APP. 1-3.

The United States District Court's Memorandum Decision Re Orders to Show Cause imposing a prefiling order against the Frankovich Group and precluding it from filing further ADA Complaints without the permission of the presiding judgment of the District Court for the Central District of California is reported at 359 F.Supp.2d 924 (C.D. Cal. 2005).

The United States District Court Order Dismissing Case for Lack of Standing is reported at 385 F.Supp.2d 1042 (C.D. Cal. 2004), and is reprinted in Petitioners' Petition at APP. 39.

The Decision of the United States Court of Appeals for the Ninth Circuit affirming the District Court's Orders is reported at 500 F.3d 1047 (9th Cir. 2007), and is reprinted in Petitioners' Petition at APP. 1.

The Order Denying the Petition for Rehearing and Rehearing *En Banc* of the United States Court of Appeals for the Ninth Circuit is reported at 521 F.3d 1215 (9th Cir. 2008), and is reprinted in Petitioners' Petition at APP. 91.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Molski is paralyzed from the waist down and is confined to a wheelchair. Molski has never been employed. The only income he receives is from settlements. On any given day, just like a predator, Molski travels up and down the State of California seeking out places of public accommodation intent on finding businesses that he can sue in federal court who may not be in complete compliance with the ADA. Molski does not care about the rights of the disabled. Molski and the Frankovich Group's only concern is how much money will they receive in

settlement from each defendant that crosses their path.

This case is NOT about access for the disabled to public accommodations pursuant to the Americans with Disabilities Act of 1990 ("**ADA**"). This case is but one in over 400 cases wherein Jarek Molski (hereinafter referred to as "**Molski**"), aided and abetted by his attorney, the Frankovich Group, have sued small businesses throughout the State of California for alleged violations of the ADA. Molski and the Frankovich Group are NOT interested in injunctive relief, which is the only relief available under the ADA. Instead, Molski and the Frankovich Group allege a cause of action under the ADA and then seek damages, *inter alia*, of $4,000 per day for each day that the place of accommodation is not in compliance, punitive damages and pre-judgment interest pursuant to analogous state law claims under the Unruh Civil Rights Act and the California Disabled Persons Act, and attorney's fees and costs. Furthermore, the "letter" sent by the Frankovich Group to each and every Defendant ever named in one of Molski's Complaints warns the Defendants NOT TO MAKE ANY REPAIRS or they will be liable for "spoliation of evidence." Molski and the Frankovich Group always wait at least one year before they sue. The United States District Court noted in its Order Declaring MOLSKI a Vexatious Litigant entered on December 10, 2004 "the damages requested are quite significant. Molski routinely asks for $4,000 per day, for every day from his visit until the repairs are

completed. And Molski often waits a year or more before filing suit. In the instant case, the purported violation took place on January 25, 2003, but the suit was not filed until January 23, 2004. That delay alone would be worth $1,452,030 if Molski received the damages requested." [APP. 84, Page 14, fn. 7]

Simply put, the Orders at issue before this Court put Molski and the Frankovich Group out of business. As the United States District Court stated in its Memorandum Decision Re Orders to Show Cause entered on March 8, 2005:

> "In total Molski filed 16 federal lawsuits for injuries purportedly sustained over this four-day period of time. Expanding that window slightly, the record reveals that Molski filed 26 lawsuits for injuries allegedly sustained between May 16 and May 23, 2003 – with Molski purportedly sustaining at least one injury on each day during that ten-day stretch ***This period was far from an isolated incident.*** The Court's review of the complaints filed in 2004 alone reveals that on ***37 separate occasions*** Molski claimed to be injured twice or more on the same day. ***On 19 separate occasions*** he claimed to be injured three or more times in one day. On ***nine separate occasions***, Molski filed four or more federal lawsuits for injuries allegedly sustained on the same day." [APP. 82, Page 8 lines 6-20]
>
> "The record before the Court demonstrates that the Plaintiffs and their attorneys have

> participated in a pattern of abusive litigation, bordering on extortionate shysterism. The damage is not limited, however, to the businesses and insurers who are the direct victims of this scheme. The integrity of the bar is called into question by the well-publicized accounts of lawyers employing unethical tactics in the pursuit of their own financial gain. The legitimacy of the courts is also injured because the public may view the courts as complicit in allowing these shake-down schemes to continue. Most importantly, this type of litigation creates a backlash against disabled persons who rely on the ADA as a means of achieving equal access.
>
> In such a circumstance, the Court has an obligation to protect both the public and the judicial system. By requiring the architects of the scheme to seek leave of court before filing any similar complaints, the Court has employed the least restrictive measure available that achieves this goal." *Molski v. Mandarin Touch Restaurant*, 359 F.Supp.2d 924, 938 (C.D. Cal. 2005).

The evidence before the District Court was overwhelming and both Molski and the Frankovich Group received due process as required by the Fourteenth Amendment to the United States Constitution before the District Court issued its vexatious litigant order against Molski and its pre-filing order against the Frankovich Group as a sanction pursuant to the Court's inherent power.

STATEMENT OF FACTS

Molski's Amended Complaint alleged that he visited the Mandarin Touch Restaurant in Solvang, California on January 23, 2003. As in all his lawsuits, Molski alleged that he had to use the restroom after he ate and was not able to pass through the narrow restroom, and in the course of exiting the bathroom his hand caught in the restroom door "causing trauma" to his hand.

Asserting claims under the ADA and analogous California state law, Molski sought injunctive relief (the only remedy available under the ADA), attorneys' fees and costs, and damages. Specifically, the complaint sought daily damages of $4,000 per day for each day after Molski's visit until such time as the Mandarin Touch was made fully accessible, as well as punitive damages and pre-judgment interest. The named Defendants were the landlords, Brian and Kathy McInerney, and the owner of the Mandarin Touch Restaurant, Evergreen Dynasty Corporation ("**Evergreen**").

Evergreen filed a Motion for a Pre-Filing Order Prohibiting Molski, a Vexatious Litigant, from Filing New Litigation Without Leave of Court. Molski filed his Opposition to the Vexatious Litigant Motion. After the parties filed their evidence in support of and in opposition to the Motion, the Court held a hearing on December 9, 2004. After considering the evidence and hearing oral argument presented by the Frankovich Group, the District Court granted the Motion and

declared Molski a Vexatious Litigant and issued a pre-filing order requiring Molski to obtain leave of court before filing any ADA litigation in the District Court for the Central District of California only. [APP. 71]

At the conclusion of the hearing, the District Court issued an Order to Show Cause commanding the Frankovich Group to show cause why the District Court should not require them to seek leave of court before filing a complaint alleging violations of the ADA, and to show cause why the District Court should not pursue disciplinary action against them under Local Rule 83-3. [APP. 1-3]

On March 8, 2005, the District Court issued its Memorandum Decision re Orders to Show Cause and issued a pre-filing order against the Frankovich Group. The District Court based its order on the finding that "[a]fter an extensive review of The Frankovich Group's litigation practices, the Court believes it must exercise its inherent power to protect the judicial system and the public from the abusive and predatory litigation practiced by the respondents." The District Court concluded that "the Court has taken into account several factors in determining whether it is necessary to exercise its inherent power to protect the public and the courts. Based on the litigation history of giving unethical advice, making questionable allegations of physical injury, pursuing excessive compensatory damages, and securing quick settlements, the Court concludes that an exercise of its inherent power is appropriate."

Molski v. Mandarin Touch Restaurant, 359 F.Supp.2d 924, 926 (C.D. Cal. 2005). The District Court's Memorandum Decision then goes through the evidence before the Court and the reasons why the Court issued the pre-filing order against the Frankovich Group and informed the Frankovich Group that the Court had requested that the State Bar of California to investigate the matter and consider disciplinary action if appropriate. *Id.* at 934.

Just like Molski, the Frankovich Group had notice of the Order to Show Cause, and had an opportunity to present evidence to the Court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

CERTIORARI SHOULD BE DENIED BECAUSE BOTH MOLSKI AND THE FRANKOVICH GROUP WERE AFFORDED DUE PROCESS AND THE DISTRICT SPECIFICALLY FOUND THAT THE LAWSUITS FILED WERE FRIVOLOUS AND NON-MERITORIOUS

As to Molski

The District Court based its decision on the factors listed in the Second Circuit Court's decision in *Safir v. United States Lines, Inc.*, 792 F.2d 19, 23 (2nd Cir. 1986). The Ninth Circuit Court has ruled that the factors listed in *De Long v. Hennessey*, 912 F.2d 1144 (9th Cir. 1990) must be considered in determining whether to enter a pre-filing order. The factors listed in these two cases are not in conflict with each other

The *Safir* Court's factors are: "(1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties." [*Molski v. Mandarin Touch Restaurant*, 500 F.3d 1047, 1058 (9th Cir. 2007)]

The *De Long* Court's factors are: "The first factor under *De Long* is whether Molski was given notice and an opportunity to be heard before the district court entered the pre-filing order." (*Id.* at 1058) "The second factor of the *De Long* standard is whether the district court created an adequate record for review." (*Id.* at 1058) "The third factor set forth by *De Long* gets to the heart of the vexatious litigant analysis, inquiring whether the district court made 'substantive findings as to the frivolous or harassing nature of the litigant's actions.'" (*Id.* at 1058) "The fourth and final factor in the *De Long* standard is that the pre-filing order must be narrowly tailored to the vexatious litigant's wrongful behavior." (*Id.* at 1061)

In its opinion, 500 F.3d 1047 (9th Cir. 2007), the Ninth Circuit held that the District Court's Vexatious Litigant Order met all of the criteria under *De Long*

and even though the District Court erroneously relied upon the *Safir* standard there was no conflict.

In the Order Granting Defendant's Motion to Declare Jarek Molski a Vexatious Litigant and for a Pre-Filing Order Requiring Molski to Obtain Leave of Court Before Filing Any Other Claims Under the Americans with Disabilities Act filed on December 9, 2004, the District Court made the following findings with respect to the merits of Molski's First Amended Complaint as follows:

> "Plaintiff Jarek Molski is a physically disabled individual who relies on a wheelchair for ambulation. Although he resides in Woodland Hills, he has filed hundreds (fn. 2) of lawsuits in federal courts throughout the state of California.
>
> A review of the cases submitted to this Court reveals that many are nearly identical in terms of the facts alleged, the claims presented, and the damages requested. In virtually every complaint involving a restaurant or winery, Molski initially reports having trouble finding adequate van-accessible parking. Then, almost uniformly, he reports difficulties entering the business, often citing ramps that are too steep, or doors that require more pressure to open than is permitted by law. After entering the business, Molski generally complains that the service counter is too high. Virtually every complaint ends with Molski venturing to the restroom, which inevitably suffers from at least one

violation. Molski almost always suffers some injury typically to the upper extremities in the process of transferring himself from his wheelchair to the toilet. He also regularly complains of suffering humiliation or other emotional distress from the experience. Molski's prayer for relief routinely includes both a request for injunctive relief and damages of $4,000 per day, for each day after his visit until the facility is brought up to ADA standards.

The facts of the instant case are predictably similar. On January 25, 2003, Molski's complaint alleges that he had dinner at the Mandarin Touch Restaurant in Solvang, California. After dinner, Molski attempted to use the restroom, but found that the entrance was too narrow. Molski then alleges that as he was attempting to leave the restroom, his hand became "caught in the exterior door causing trauma to it." The lawsuit asks for injunctive relief to bring the restaurant up to ADA standards, and damages of not less than $4,000 per day, for each day after his visit until such time as the restaurant is made fully accessible." [APP. 72 -74]

"After examining Plaintiff's extensive collection of lawsuits, the Court believes that most, if not all, were filed as part of a scheme of systematic extortion, designed to harass and intimidate business owners into agreeing to cash settlements." [**Exhibit "5"** – Page 9:2-7]

"Most important, however, is the Court's conclusion that the allegations contained in Plaintiff's complaints are contrived and not credible. Although it is not obvious when looking at an individual complaint, examining Plaintiff's complaints in the aggregate reveals a clear intent to harass businesses." [APP. 80]

"The Court is tempted to exclaim: 'what a lousy day!' It would be highly unusual – to say the least – for anyone to sustain two injuries, let alone three, in a single day, each of which necessitated a separate federal lawsuit. But in Molski's case, May 20, 2003, was simply business as usual. Molski filed 13 separate complaints for essentially identical injuries sustained between May 19, 2003 and May 23, 2003. The Court simply does not believe that Molski suffered 13 nearly identical injuries, generally to the same part of his body, in the course of performing the same activity, over a five-day period. This is to say nothing of the hundreds of other lawsuits Molski has filed over the last four years, many of which make nearly identical allegations. The record before this Court leads it to conclude that these suits were filed maliciously, in order to extort a cash settlement." [APP. 81-82]

"The ADA itself allows private plaintiffs to sue for injunctive relief, and to recover their attorneys' fees and costs. It does not allow or any award of money damages to a private plaintiff. If Molski's motivation was genuinely

to obtain injunctive relief and recover his legal costs, he could sue entirely under the ADA. But he does not do that. Instead, Molski almost always raises additional state law claims under the CDPA, California Health & Safety Code, the Unruh Civil Rights Act, and California Bus. & Prof. Code § 17200, which allow for the recovery of money damages.

Clearly, raising multiple claims, by itself, is not unethical or vexatious. However, it is consistent with an overall pattern of behavior that demonstrates Molski's motivation is, ultimately, to extract a cash settlement. The threat of significant money damages (fn7) is a much more effective inducement to settle than merely requesting a court order to make 'readily achievable' repairs. And that threat appears to be working. Almost as startling as the sheer number of complaints Molski has filed, is the number of those claims that settle. Of the hundreds of cases Molski has filed in this district, not one has ever been litigated on the merits. The overwhelming majority settle, with a significant minority dismissed for violation of a court order, or failure to prosecute the claim. This not only calls into question Molski's good faith expectation of prevailing on the merits of his claim, but also suggests that he does not even have a reasonable expectation (or intention) of litigating the suit on the merits.[8] Molski's m.o. is clear: sue, settle, and move on to the next suit.

> FN. 8. Additionally, given Molski's considerable history of making questionable claims, a jury could reasonably refuse to credit his testimony. This further weakens the likelihood of Molski prevailing on the merits of his claims." [APP. 83-85]

"In addition to misusing a noble law, Molski has plainly lied in his filings to this Court. His claims of being the innocent victim of hundreds of physical and emotional injuries over the last four years defy belief and common sense.

But Molski has not acted alone. In every action, Molski is aided and abetted by his attorneys, often the Thomas E. Frankovich Law Offices, and his corporate co-Plaintiff, Disability Rights Enforcement Education Services: Helping You Help Others ('DREES'). For that reason, this Court is also issuing orders to show cause why the Court should not exercise its inherent power to extend similar sanctions to them, for their role in facilitating Molski's abusive litigation practices." [APP. 86-87]

"Sadly, Molski is not unique. The Trevor Law Group, and others like it, have achieved infamy in California for carrying out a similar scheme under California's Unfair Business Practices statute, Bus. & Prof. Code § 17200 *et seq*. As one Court described it:

> The abuse is a kind of legal shakedown scheme: Attorneys form a front "watchdog" or "consumer" organization. They

> scour public records on the Internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of the front organization. Since even frivolous lawsuits can have economic nuisance value, the attorneys then contact the business (often owned by immigrants for whom English is a second language), and point out that a quick settlement (usually around a few thousand dollars) would be in the business's long-term interest. *People ex rel. Lockyer v. Brar*, 115 Cal. 20 App. 4th 1315, 1316-17 (2004).[1]

These words could apply, almost verbatim, to the scheme perpetrated by Molski, DREES, and the Frankovich firm. And this Court is not unmindful of the result of the Trevor Law Group's abuse of the Unfair Business Practices statute. In the most recent election, the citizens of California overwhelmingly backed Proposition 64, which greatly limited the private attorney general provision of that law. It is not beyond the realm of belief that the actions of Molski, and those like him, pose a similar threat to the ADA. Thus, this pre-filing order serves as a bulwark that not only shields the Court and defendants from vexatious litigation, but also protects the

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[1] The Court should note that the Mandarin Touch is a family owned restaurant in Solvang whose owners are Chinese immigrants from Taiwan.

> 'purpose and spirit of the ADA.' It does not limit the right of a legitimately aggrieved disabled individual to seek legal relief under the ADA; it only prevents abuse of that law by professional plaintiffs, like Molski, and their lawyers, such as the Frankovich firm, whose priority is their own financial gain, and not 'the elimination of discrimination against individuals with disabilities.' 42 U.S.C. § 12101(b)(1)" [APP. 88-89]

Molski was given notice and an opportunity to be heard by the District Court. The District Court specifically found that Molski's complaints were frivolous and meritless. As the Court can see the Petition for Writ of Certiorari is without merit and does not present a question of national significance "never before faced by this Court." [Petition, Page 16]

As to the Frankovich Group

The District Court found that the Frankovich Group had "engaged in a pattern of unethical behavior designed ultimately to extort money from businesses and their insurers." Accordingly, not only did the District Court require the Frankovich Group to seek leave before filing any new ADA complaints, but also requested a State Bar investigation into the propriety of the Frankovich Group's litigation practices.

The District Court imposed sanctions against the Frankovich Group based upon the following findings of fact:

First, the District Court noted that a letter sent by the Frankovich Group to defendants at the time of service of ADA complaints violated ethical cannons against offering advice to an unrepresented party whose interests conflicted with the lawyer's client and appeared to be "aimed at one goal: coercing a quick settlement." In this letter, the Frankovich Group advised defendants that they might have insurance coverage to cover the claims made against them and further informed them of the specific provisions that might cover the claims; that they had no "bona fide" defense; and that they should settle rather than "waste your money in needless litigation."

Second, the District Court concluded that the "claimed physical injuries" in Molski's numerous complaints were "canned" and "contrived in order to implicate the defendants' insurance policies." The District Court based this conclusion on the rate of physical injury – all of the ADA complaints filed in 2004 by the Frankovich Group alleged a physical injury; the similarity of the alleged injuries and the fact that they were allegedly sustained in different businesses on the same day; and the contradictions between the claimed injuries and the actual allegations.

Third, the Frankovich Group regularly waited "up to one year before filing their claims, during which time the requested daily damages" of $4,000 continued to accumulate. The District Court concluded that the obvious intent of this tactic was to use

a large damage figure to "intimidate" a small business without representation to enter into a quick settlement.

Finally, the District Court found the unusual number of settlements of cases filed by the Frankovich Group "indicative of an extortion scheme." While the settlements standing alone would not necessarily have been proof of such a scheme, when coupled with the "aggressive and unethical" manner in which they were pursued, the unusually high rate of settlements indicated such an extortion scheme.

The Frankovich Group had notice that the District Court was considering entering a Pre-Filing Order and had an opportunity to oppose it. In addition, the District Court specifically identified numerous filings by the Frankovich Group that it found to be frivolous. Finally, the District Court's order was narrowly tailored to prevent infringement on the Frankovich Group's right of access to the courts because the Pre-Filing Order only applies in the United States District Court for the Central District of California.

There is no basis for the issuance of Certiorari in this case.

CONCLUSION

For these reasons, this Honorable Court must deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Evergreen Dynasty Corporation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAREK MOLSKI, an individual; and DISABILITY RIGHTS ENFORCEMENT EDUCATION SERVICES; HELPING YOU HELP OTHERS, a California corporation,

Plaintiffs,

v.

MANDARIN TOUCH RESTAURANT; EVER-GREEN DYNASTY CORP., a California corporation; and BRIAN McINERNEY and KATHY S. McINERNEY, as joint tenants,

Defendants.

Case No. CV 04-0450 ER

ORDER TO SHOW CAUSE

(Filed Dec. 10, 2004)

To the THOMAS E. FRANKOVICH LAW OFFICES, and to DISABILITY RIGHTS ENFORCEMENT EDUCATION SERVICES: HELPING YOU HELP OTHERS ("DREES"), and to JAREK MOLSKI, for the reasons discussed in the Court's Order Granting Defendant's Motion to Declare Jarek Molski a Vexatious Litigant, you and each of you, are hereby ordered to show cause as follows:

[1] Both DREES and the Frankovich firm are ordered to show cause why The Court should not require them to seek leave of court before filing a complaint alleging violations of the Americans with Disabilities Act ("ADA"). The Frankovich firm is further ordered to show cause why this Court should not pursue disciplinary action against them under Local Rule 83-3.

[2] DREES is ordered to show cause why their complaint alleging violations of the ADA should not be dismissed for lack of standing.

[3] Plaintiffs are ordered to show cause why their claim under the ADA should not be dismissed as a sham complaint, used as a pretext to gain access to the federal courts, and their remaining claims remanded to the state court.

All responses shall be in writing and are due by January 3, 2005. The Defendants may also file a response, if they wish. This matter shall come on for hearing January 10, 2005 at 10:00 a.m.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or by telefax or by email, copies of this Order on counsel for the parties in this matter.

Dated: DEC 10 2004

/s/ Edward Rafeedie
EDWARD RAFEEDIE
Senior United States
District Judge

THE FRANKOVICH GROUP*
LAWYERS

2806 Van Ness Avenue – San Francisco, CA 94109-1426
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June 18, 2004

Kathy McInerney
538 Miramonte Drive
Santa Barbara, CA 93109

Re: *Molski v. Mandarin Touch*
USDC C.D. Ca Case No.CV 04-0450 ER (SHx)
Our Reference: Mandarin Touch
Subject: Discrimination by Failure to Remove Architectural Barriers

Dear Ms. McInerney:

You are being served with a Summons and Complaint for failure to remove architectural barriers as required under state discrimination statutes and/or under the Americans with Disabilities Act of 1990. The failure to remove barriers deprived our client of the full use, enjoyment of goods, services and opportunities of your public accommodation.

Please read the "Factual Allegations" section of the Complaint. That section sets forth the major architectural barriers about which our client and the disability community are most concerned. This will allow you to quickly assess the barriers and determine the cost of the remedial work sought.

We believe the following architectural barriers could be addressed/removed within ninety (90) days:

1. reconfigure the register area and seat near the restrooms to provide for additional space for a restroom remodel;

2. with a reconfiguration of the register area combine the men's and women's restroom into a unisex handicapped accessible restroom.

The concept of barrier removal is probably clear to you. The details of barrier removal are probably unclear to you. We are more than willing to do a walk-through with you and suggest solutions.

Once you have retained counsel, we will not be able to communicate with you directly. That is why we are taking this opportunity to discuss our position on this action and to call attention to certain issues that you should be aware of:

1. This action is filed in the Federal District Court.

2. The action seeks:
   - Injunctive Relief
   - Compensatory Damages
   - Attorneys' fees and costs

3. Injunctive Relief: Plaintiff seeks an order from this court to issue a mandatory injunction compelling you to make the subject public accommodation accessible as set forth in the Complaint.

4. Compensatory Damages: Monetary damages (money) are sought on behalf of the plaintiff for the damages suffered as a result of the acts of discrimination. This is a state cause of action.

5. Attorneys' fees, costs and litigation expenses are provided both under state and federal law. If the plaintiff prevails, these costs and litigation expenses will be awarded against you.

6. Insurance Coverage: Insurance may be available to you for this claim. CAVEAT/ BEWARE:

   i. Your insurance company may deny coverage.

   ii. Your insurance company may defend you under a "Reservation of Rights." That means your insurance company will provide a defense for you (hire attorneys on your behalf) but reserve the issue as to whether they are obligated to pay the claim.

   iii. If you have a general liability policy, coverage may be extended to you under the following provisions: bodily injury coverage; advertising coverage; and/or wrongful eviction coverage.*

      - *Bodily Injury Coverage*: Bodily injury coverage is generally extended to claims that pertain to "bodily injury" and emotional

distress if there is a direct relationship to bodily injury.

- *Advertising Coverage*: Advertising coverage may be extended if you advertised that your public accommodation was accessible which resulted in bodily injury, property damage or damages. Examples of advertising, publicizing or representing that the public accommodation was accessible would be displaying the international disability symbol, advertising that the public accommodation is accessible, representations by employees stating that the public accommodation is wheelchair accessible, usable by persons with disabilities, can accommodate a person with disabilities, or the like.

- *Wrongful Eviction Coverage*: Wrongful eviction coverage is normally extended for the hotel/motel/resort industry where a disabled person is forced/compelled to leave a guest room because it is not accessible. The theory is that this constitutes an "actual eviction." Another "theory" for coverage is "constructive" eviction. For example, if a room is available but not

accessible, this may constitute constructive eviction as it would be a "futile gesture" for a person with disabilities to attempt to secure the guest room.

*These are theories and you should consult your coverage counsel to discuss their application, validity and usefulness.

iv. Insurance may or may not cover attorneys' fees and costs that you may be ordered to pay. Too often defendants believe, or are led to believe, that their insurance companies will pay the plaintiff's attorneys' fees. You must determine what your insurance actually provides. Ultimately, you will be responsible for paying our fees, should we prevail. Therefore, the issue of coverage should be of utmost concern to you. Simply put, if you receive a "Reservation of Rights" letter, you may still be financially responsible to pay compensatory damages and plaintiff's attorneys' fees and costs. We urge you in this instance, to seek independent counsel, and not rely upon insurance defense attorneys, to determine your rights and your exposure.

7. Defense Billing: Once defense attorneys respond to or answer the Complaint, the

> vast majority, rather than attempt to settle the action, embark on a "billing" exercise. Simply put, the defense attorneys want to sufficiently "bill it" before they get realistic about the settlement. This may cost you a significant amount of money that could be better spent on the remedial work and settlement of the action. Keep in mind, the more work your attorneys force on us, the more work we must do. The more work we do is just that much more money you may be responsible for paying.

We do not believe you have any bona fide defense to your continuing obligation to identify and remove architectural barriers pursuant to the ADA, which was passed over a decade ago, (14 years). We do not want to see you waste your money on needless litigation. We want access agreed to now, not later. In essence, we are making a demand that you enter into a Mutual Settlement Agreement and Release for the removal of all of the architectural barriers raised in the complaint to completely resolve this aspect of the case. This will accomplish two things – first, it will provide full access which is positive; and second, it will significantly reduce attorneys' fees for all parties. Keep in mind that all remedial work necessary to remove barriers at Mandarin Touch can be resolved in a settlement agreement by setting forth a reasonable time line. This will give you financial flexibility in your planning.

You may contact us for the agreement before you retain counsel to explore resolution of this action. Otherwise, we will forward a copy to your counsel when you become represented.

Once you have committed or can assure us, in writing, that the remedial work will in fact be undertaken, you may have your attorneys contact us to resolve all aspects of the action now. That can occur through a direct negotiation with your attorneys or through a court-supervised mediation/settlement conference.

If you do not follow our suggestions or requests, which is your choice, we understand. We can then rest assured that you received our message on how this case could efficiently and cost effectively be resolved at this stage in the litigation. It will also serve as a reminder to you later in the litigation that we gave you the earliest opportunity to settle the action before the cost of litigation started to rise, or as some may say, skyrocket.

We hope you accept this letter as friendly advice. We find all to often that many defendants are not properly advised as to their position in the litigation, insurance coverage issues, injunctive relief sought, damages, the tactics of insurance defense attorneys, attorneys' fees, and the use of an early mediation/settlement conference to resolve the matter.

Returning to the issue of full insurance coverage, if in fact you are denied coverage (money) to pay any part of the claim which is monetary in nature, this office

at the conclusion of the litigation would consider discussing with you the merits of a "bad faith" case against your insurance carrier. You should keep this in mind and discuss it with your own private counsel, not counsel hired by the insurance company.

Defendants that do not consider an early settlement eventually face the hard reality that the remedial work will have to be done, compensatory damages paid and that attorneys' fees and costs have risen substantially. That is why we have taken this opportunity to explain to you our position so you can make a sound decision as to the course you wish to take – that being either to consider early settlement discussions or to litigate the matter. If you wish to entertain settlement now, you may contact us directly unless you have retained counsel. In that event, you may have your attorneys contact us. I remain,

Very truly yours,

/s/ Thomas E. Frankovich
Thomas E. Frankovich
DICTATED BUT NOT READ
IN THE INTEREST OF TIME

TEF/amc